

MAY 28 1991

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CC:PSI:8

Exemption Certificates - IRS Notice 88-132

This responds to your March 19, 1991, memorandum regarding the excise tax on diesel and aviation fuel.

You would like answers to the following questions:

1. Can tax be proposed on any sale by a producer that is made for tax-exempt purposes for which no exemption certificate has been secured?

2. If the tax is assessed on such sales, can the taxpayer claim a credit in the current period or file a claim for refund on the assessment once the certification has been secured?

The answer to your first question is "yes."

Section 4091 of the Code imposes a tax on the sale of diesel and aviation fuel by the producer thereof. Section 4093 exempts from tax sales for certain nontaxable uses.

Section IV of Notice 88-132 provides that a producer can be relieved from liability for tax under section 4093 of the Code if, among other things, it obtains a described exemption certificate from its buyer. Thus, under Notice 88-132, tax can technically be assessed on sales that are not supported by a proper exemption certificate.

However, another question that should be asked in this regard is whether tax should be assessed in all cases if the seller has failed to secure an exemption certificate.

Notice 88-132 does not state whether the certificate set forth therein is the only evidence of a tax-free sale that may be accepted. Also, the Notice does not specifically require the certificate to be obtained by any particular time. Another complicating factor is that the Notice does not have the force and effect of a regulation.

Thus, if a producer does not obtain an exemption

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certificate of the type described in Notice 88-132 before making a tax-free sale but later obtains such certification or has undisputed evidence that the producer's buyer used the fuel for a nontaxable use, then we believe that serious consideration should be given to whether any assessment against the producer will be upheld in Appeals or in the courts.

The issue you have raised is nationwide in scope. We are thus working with the Examination Division in the National Office to provide guidance to the districts for resolving cases of this type. We hope that this guidance will soon be issued.

The answer to your second question is "no."

Section 6427(1) of the Code allows the ultimate purchaser of diesel or aviation fuel to obtain a credit or refund of the tax paid if such fuel is used in a nontaxable use. Nothing in the Code allows a producer to obtain a credit or refund of tax paid if the fuel it sells is used in a nontaxable use.

This adds to the litigation problems discussed in response to your first question because section 6427(1) precludes a credit or refund to the producer even in cases where the fuel sold was unquestionably used in an exempt use.

If you have any questions about this, please contact Frank Boland at (FTS) or (202) 566-4475.